OTHMAN ALI & ORS v. BUKIT LENANG DEVELOPMENT SDN BHD

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
MOHAMAD ARIFF YUSOF JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: J-02(IM)-2330-10-2013]
12 MAY 2016

TORT: *Trespass to land – Damages – Claim for – Assessment of – Measure of damages – Findings of – Whether Senior Assistant Registrar and judge in chambers misapplied correct measure of damages – Whether land markedly appreciated in value between time of purchase and date of assessment of damages – Whether damages suffered adequately compensated based on increase in market value of land – Whether there was diminution in value to land – Whether defendants occupied part of land – Whether Senior Assistant Registrar and judge in chambers erred in awarding amount of damages*

CIVIL PROCEDURE: *Damages – Assessment of – Measure of damages – Trespass to land – Unlawful occupiers – Findings of – Whether Senior Assistant Registrar and judge in chambers misapplied correct measure of damages – Whether land markedly appreciated in value between time of purchase and date of assessment of damages – Whether damages suffered adequately compensated based on increase in market value of land – Whether there was diminution in value to land – Whether defendants occupied part of land – Whether Senior Assistant Registrar and judge in chambers erred in awarding amount of damages*

The respondent ('plaintiff') purchased subdivided lots of land ('the land') in March 1996. The plaintiff claimed that the appellants ('defendants') which consist a total of 291 individuals were in wrongful occupation of the land and sought for orders for vacant possession and damages to be entered against the defendants. After a full trial, the High Court allowed the plaintiff's claim and ordered that the defendants pay damages to the plaintiff which was to be assessed by the Senior Assistant Registrar ('SAR'). The SAR then ordered that the defendants pay damages in the sum of RM63,873,000 to the plaintiff. The defendants appealed to the judge in chambers against that award of damages made in favour of the plaintiff. However, the judge dismissed the defendants' appeal and affirmed the award of damages made by the SAR. Hence, the present appeal. It was the contention of the defendants that the SAR and the judge had misapplied the correct measure of damages since the land had markedly appreciated in value between the time of its purchase by the plaintiff and the date of assessment of damages, as such, any such 'loss' or 'damage' suffered had been more than adequately compensated by such increase in the market value of the land. It was also urged that the award of damages had occasioned a grievous miscarriage of justice against the defendants as the defendants only occupied part of the land. On the contrary,

A the plaintiff also asserted that in the absence of any direct evidence of loss, the '5% of the market value of land' should be applied in the present case to equate a fair annual return expected from the land.

Held (allowing appeal; setting aside award of damages)
Per Varghese George JCA delivering the judgment of the court:

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(1) Although the plaintiff might have been *de facto* deprived of the physical use of the land by reason of the presence of the defendants thereon, the market value of the land had not been adversely diminished but to the contrary, the plaintiff stood to benefit from a marked appreciation insofar as its market value was concerned during that interim period. (para 27)

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(2) The plaintiff was a developer and had purchased the land for purposes of commercial/building development. However, it was incumbent upon the plaintiff to adduce (i) credible evidence indicative of the projected 'profits' the plaintiff had been denied by the fact that the land could not be developed as was intended, and (ii) alternatively, reliable evidence of either what would represent a fair rental at market rates that the plaintiff would have in all probability earned from the particular area of the land that was occupied respectively by each of the defendants and what would be a fair rental-benefit that would have likely accrued to each of the defendants from the respective areas within the land that each of them had wrongfully occupied. The plaintiff had failed to put forward any such evidence, which was open to the plaintiff for a proper assessment of 'damages' to be undertaken. (paras 30, 33 & 34)

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(3) The plaintiff failed to demarcate and identify the size of the actual area within the land that had been separately and individually occupied by each of the defendants respectively. In the circumstances, the SAR ought not to have ordered damages implicating all the defendants without taking into consideration the fact that the plaintiff had only been deprived of the use of such actual area in the land occupied by each of the defendants. (para 34)

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(4) The assertion by the plaintiff was wholly misconceived. The SAR and the judge had clearly misdirected themselves in accepting that '5%' of market or capital value of the land represented a fair return or rental expected from the land. Rental return on bare land or built-up property would principally depend on the location of the subject property. It would therefore be variable from place to place and over any given period of time. To accept a flat rate would be antithetical to fairness and common sense in the natural course or order of things. In any event, there was no evidence led by the plaintiff as to why '5%' per annum was a justifiable return in the circumstances of the land. Therefore, the wholesale adoption of the '5%' formula by the courts below without further critical analysis of its very basis and crucial evidential support, was totally unjustified both on the facts and in law. (paras 36, 39, 40 & 41)

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(5) The plaintiff undeniably continued to be the landlord of the land. There was no diminution in value to the land directly caused by the 'trespass' of the defendants to parts of the land. On the contrary, the overall land had appreciated in value in the interim. There was also no direct evidence adduced as to any costs of 'repairs' or of damages incurred by the plaintiff with respect to the parts of the land occupied by the defendants. There was also no evidence of what would be a fair rental that the plaintiff could have expected from the specific land, much less any apportionment of liability for any such loss of rental as amongst the individual defendants, with reference to the respective areas separately occupied by the defendants. Therefore, the plaintiff's claim for damages was unsustainable on evidence and ought to have been rejected outright. (para 43)

Bahasa Malaysia *Headnotes*

Responden ('plaintif') membeli tanah yang dibahagikan ('tanah') pada Mac 1996. Plaintif mendakwa perayu-perayu ('defendan-defendan') yang terdiri daripada 291 individu adalah penceroboh dengan menduduki tanah tersebut secara salah dan memohon perintah untuk milikan kosong dan ganti rugi dituntut terhadap defendan-defendan. Selepas perbicaraan, Mahkamah Tinggi membenarkan tuntutan plaintif dan mengarahkan defendan-defendan membayar ganti rugi kepada plaintif yang akan ditaksir oleh Penolong Kanan Pendaftar ('PKP'). PKP kemudian memerintahkan defendan-defendan membayar ganti rugi berjumlah RM63,873,000 kepada plaintif. Defendan-defendan merayu kepada hakim dalam kamar terhadap award ganti rugi yang memihak kepada plaintif. Walau bagaimanapun, hakim menolak rayuan defendan-defendan dan mengesahkan award ganti rugi yang dibuat oleh PKP. Oleh itu, rayuan ini. Adalah hujahan defendan-defendan bahawa PKP dan hakim telah menyalahgunakan langkah yang betul bagi ganti rugi kerana nilai tanah itu meningkat dengan ketara antara masa pembelian oleh plaintif dan tarikh penilaian ganti rugi, dengan itu, sebarang pampasan terhadap 'loss' atau 'damage' yang dialami itu lebih daripada cukup berhubung peningkatan dalam nilai pasaran tanah. Ia juga diketengahkan bahawa award ganti rugi menyebabkan ketidakadilan terhadap defendan-defendan kerana defendan-defendan hanya menduduki sebahagian daripada tanah itu. Sebaliknya, plaintif juga menegaskan bahawa tanpa apa-apa keterangan langsung kerugian, '5% of the market value of land' seharusnya diguna pakai dalam kes bagi menyamakan pulangan tahunan yang adil dijangka dari tanah tersebut.

Diputuskan (membenarkan rayuan; menolak award ganti rugi)
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Walaupun plaintif mungkin *de facto* dihalang daripada penggunaan fizikal tanah tersebut atas alasan pendudukan defendan-defendan, nilai pasaran tanah itu tidak berkurangan dengan ketara tetapi sebaliknya, plaintif hanya akan beruntung sama sekali daripada peningkatan ketara nilai pasaran berkenaan semasa tempoh interim.

(2) Plaintif adalah pemaju dan telah membeli tanah bagi tujuan pembangunan komersial/binaan. Walau bagaimanapun, menjadi tanggungjawab plaintif untuk mengemukakan (i) keterangan munasabah yang menunjukkan 'profits' yang dinafikan terhadap plaintif atas fakta bahawa tanah itu tidak boleh dibangunkan seperti yang diinginkan, dan (ii) secara alternatif, keterangan boleh dipercayai sama ada apa yang akan mewakili sewa yang berpatutan pada kadar pasaran yang mana plaintif akan berkemungkinan peroleh dari kawasan tertentu tanah yang diduduki oleh setiap defendan dan apa yang akan menjadi faedah sewa adil yang akan mungkin terakru kepada setiap defendan daripada kawasan tanah masing-masing yang mana setiap mereka telah duduki secara salah. Plaintif gagal mengemukakan apa-apa keterangan sedemikian, yang terbuka kepada plaintif bagi penilaian betul 'damages' yang akan dijalankan.

(3) Plaintif gagal untuk membatasi dan mengenal pasti saiz keluasan sebenar kawasan tanah yang telah secara berasingan dan secara individu diduduki oleh setiap defendan. Dalam hal keadaan ini, PKP sepatutnya tidak memerintahkan ganti rugi melibatkan kesemua defendan tanpa mengambil kira fakta bahawa plaintif telah hanya dihalang penggunaan kawasan sebenar tanah yang diduduki oleh setiap defendan.

(4) Dakwaan oleh plaintif adalah keseluruhannya salah anggapan. PKP dan hakim jelas tersalah arah apabila menerima bahawa '5%' nilai tanah pasaran atau modal itu mewakili pulangan yang adil atau sewa yang dijangka daripada tanah. Pulangan sewa atas tanah kosong atau harta binaan terutamanya bergantung kepada lokasi hartanah tersebut. Oleh itu, ia akan berubah-ubah dari satu tempat ke satu tempat dan atas tempoh masa tertentu. Untuk menerima kadar rata akan bercanggah dengan keadilan dan kepentingan sendirinya dalam kelakuan biasa atau perintah perkara. Dalam apa jua hal keadaan, tiada keterangan oleh plaintif mengapa '5%' setahun adalah pulangan munasabah dalam hal keadaan tanah. Lantarannya, formula '5%' penggunaan seluruh penjualan oleh mahkamah di bawah tanpa analisis kritikal selanjutnya dan sokongan keterangan penting adalah sangat tidak wajar terhadap fakta dan undang-undang.

(5) Plaintif tidak dapat dinafikan sebagai tuan tanah. Tiada pengurangan nilai tanah yang disebabkan secara langsung oleh 'trespass' oleh defendan-defendan ke sebahagian tanah. Sebaliknya, nilai keseluruhan tanah telah meningkat dalam interim. Tiada keterangan langsung dikemukakan tentang apa-apa kos 'repairs' atau ganti rugi yang ditanggung oleh plaintif berkenaan bahagian-bahagian tanah yang diduduki oleh defendan-defendan. Malah tiada juga keterangan mengenai apa yang dianggap sewaan adil yang mana dijangka oleh plaintif dari tanah tertentu apatah lagi apa-apa pembahagian liabiliti bagi

apa-apa kerugian sewa sebagai antara individu defendan, dengan merujuk kepada kawasan secara berasingan diduduki oleh defendan-defendan. Oleh itu, tuntutan plaintif untuk ganti rugi tidak boleh dikekalkan atas keterangan dan sepatutnya ditolak sama sekali.

Case(s) referred to:

Beatrice Ramanathan (f) & Anor v. Shah Alam Properties Sdn Bhd & Another Case [1994] 4 CLJ 646 HC ***(refd)***

Cottrill v. Steyning Littlehampton Building Society [1962] QBD 196 ***(refd)***

Davies v. Powell Duffryn Associated Collieries Ltd [1942] AC 601 ***(refd)***

Goo Sing Kar v. Dato' Lim Ah Chap & Ors [2013] 2 CLJ 936 CA ***(refd)***

Inverugie Investments v. Hackett [1995] 3 All ER 841 ***(refd)***

Liew Yew Tiam & Ors v. Cheah Cheng Hoc & Ors [2001] 2 CLJ 385 CA ***(refd)***

Mahmod Kailan v. Goh Seng Choon & Anor [1976] 1 LNS 68 FC ***(refd)***

Mawar Biru Sdn Bhd v. Lim Kai Chew [1992] 1 LNS 22 HC ***(refd)***

Rabiah Lip & Ors v. Bukit Lenang Development Sdn Bhd & Other Appeals [2008] 3 CLJ 692 CA ***(refd)***

Topaiwah v. Salleh [1968] 1 LNS 161 FC ***(refd)***

Toyo Textiles Industries Sdn Bhd & Anor v. Lian Foong Housing Dev (M) Sdn Bhd [1985] 1 LNS 103 HC ***(dist)***

For the appellant - Badrol Hisham Md Sani; M/s Zainal & Badrol
For the respondent - Tan Jee Tjun; M/s Thomas & Philip

[Editor's note: Appeal from High Court, Johor Bahru; Civil Suit No: 22-480-2000 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Varghese George JCA:

[1] The appeal before us was against the decision of learned High Court Judge in Johor Bahru Civil Suit No: 22-480-2000 which on 18 September 2013 had affirmed an assessment and award of damages by the learned Senior Assistant Registrar (SAR).

[2] After having heard and considered the submission of the respective counsel for the parties, we had allowed the appeal and set aside that award of damages. We now set out our grounds for doing so.

[3] The appellants (in total 291 individuals) were the defendants in the aforementioned suit. The respondent, who was the plaintiff, was at the time of the commencement of the action in 2000 the registered owner of subdivided lots of land originally comprised in Grant 72 for Lot 83, Mukim of Plentong, Johor Bahru (the land).

[4] The parties will be referred to in this ground as they were at the High Court.

A **Background**

[5] The plaintiff had purchased the land from its previous owner, one Oakfield Enterprises Sdn Bhd, in March 1996. The plaintiff claimed that all the defendants were in wrongful occupation of the land and sought for orders for vacant possession and damages to be entered against the defendants.

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[6] The defendants disputed that allegation and maintained that they had valid sale agreements with the previous owner of the land. Some of the defendants had also filed counterclaims against the plaintiff.

[7] After a full trial the High Court on 28 April 2003 allowed the C plaintiff's claim. The High Court also ordered that the defendants pay damages to the plaintiff to be assessed by the learned SAR. The counterclaims brought were dismissed.

[8] The defendants pursued with an appeal against that decision but on 13 April 2007 the Court of Appeal dismissed that appeal. (*Rabiah Lip & Ors* D *v. Bukit Lenang Development Sdn Bhd & Other Appeals* [2008] 3 CLJ 692).

[9] The first hearing of the assessment of damages before the SAR was heard on 30 April 2009 (SAR-1). The plaintiff adduced evidence through their first witness.

E **[10]** The next hearing of the assessment was on 8 August 2012 before another SAR (SAR- 2). The second witness for the plaintiff and the only witness for the defendants gave evidence.

[11] On 27 May 2013 the SAR-2 ordered that the defendants pay damages in the sum of RM63,873,000 to the plaintiff. The damages allowed was only F part of the plaintiff's total claim in the sum RM110,577.404.71 which was made up of as follows:

(a)	Interest payment to bank:	RM31,626,754.64
(b)	Company expenses:	RM15,077,650.07
G (c)	Loss of use of land calculated @ 5% of the value of land From 1996 to 2008	RM63,873,000.00

[12] The defendants appealed to the judge in chambers against that award of damages made in favour of the plaintiff. No appeal was taken by the H plaintiff against that part of their claim that was not allowed.

[13] On 18 September 2013 the learned judge dismissed the appeal with costs and affirmed the award of damages made by SAR-2.

[14] There were no grounds available in this case for the order of I assessment made by SAR-2, save that, as it would be noted, the only damages allowed coincided with the plaintiff's claim for the loss of use of the land for

the period 1996 to 2008. Further the reasons given by the learned High Court Judge in affirming that award, as recorded, was unfortunately brief; it did not condescend into any discussion of the rival contentions of the parties or an analysis of soundness of the 'measure of damages' applied by the court in this case. The learned judge merely stated as follows:

> This court sitting in its appellate jurisdiction should not give preference to its own figure simply because it disagrees with the figure arrived at by the learned Senior Assistant, who had the benefit of hearing the evidence. It is trite principle that before interfering the appellate court must be satisfied that the learned Senior Assistant Registrar had acted on a wrong principle of law, or had misapprehended the facts, or had for these or other reasons made a wholly wrong estimate of the damage suffered: *Davies v. Powell Duffryn Associated Collieries Ltd* [1942] AC 601. The decision must have resulted in a serious miscarriage of justice to warrant interference by this court. I do not find this to be such a case. In the circumstances the appeal is dismissed with costs.

The Appeal

[15] Before us counsel for the defendants submitted that both the SAR-2 and the learned judge had misapprehended the peculiar facts surrounding this case and had in any case misapplied the correct measure of damages to be adopted in such circumstances. It was forcefully argued before us that the plaintiff, who had purchased the land for commercial development, had not suffered any 'loss of use' particularly since on the evidence adduced by the plaintiff itself, the land had markedly appreciated in value in the interim period, that is, between the time of its purchase by the plaintiff and the judgment (and/or date of assessment of damages); any such 'loss' or 'damage' suffered had been more than adequately compensated in any event by such increase in the market value of the land.

[16] It was also urged upon us that the award of damages as ordered by SAR-2 and affirmed by the learned judge had occasioned a further grievous miscarriage of justice against the defendants, which, by itself warranted appellate intervention to be put right. The 'loss of use' as computed and advanced by the plaintiff was in respect of the so called deprivation of the use of the whole of the said land (Lot 83) measuring in total an area of 2,812,585 square feet while the defendant (219 of them) comprised of only part of the 400 odd 'squatters' that were found on the land. More importantly, the defendants had only occupied between 4,000 to 5,000 square feet of land each; in such circumstances to impose on each of them with liability to meet the overall purported 'loss of use' (for the whole of the land, that is) without any proper apportionment on the basis of the actual area of land occupied separately by each of the defendants, it was argued breached all concepts of fairness or proportionality. The award of damage made by the court was therefore inherently unsustainable and ought to be reversed outright.

[17] In response, the plaintiff's contention was that the defendants were joint tortfeasors and having together or in concert participated in the commission of the tort of trespass, there was nothing amiss in imposing liability on them jointly (or even severally) for all the damages suffered by the plaintiff, that is, irrespective of the extent of their individual involvement (*Liew Yew Tiam & Ors v. Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385 CA).

[18] The plaintiff also asserted that the proper 'measure of damages' where there had been wrongful occupation or trespass to land was either the actual, or a notional 'loss of return' expected from the land. In this respects, in the absence of any direct evidence of loss, the '5% of the market value of land' applied in this case to equate a fair annual return expected from the land, was appropriate based on the decision of court in the case of *Toyo Textiles Industries Sdn Bhd & Anor v. Lian Foong Housing Dev (M) Sdn Bhd* [1985] 1 LNS 103; [1986] 1 MLJ 412, where a similar '5% of the capital value' was adopted as a reasonable annual return which a landowner would be entitled to.

[19] Of course, the plaintiff also submitted that an appellate court should be slow to interfere with an award of damages where there were concurrent findings or assessment. The learned judge had rightfully refused to interfere with the assessed damages and similarly this court should be disinclined to reverse the assessment that had been upheld, even if we felt that a lesser or different sum ought to have been awarded. (*Topaiwah v. Salleh* [1968] 1 LNS 161; [1968] 1 MLJ 284 FC; *Goo Sing Kar v. Dato' Lim Ah Chap & Ors* [2013] 2 CLJ 936; [2013] 3 MLJ 374 CA).

Our Deliberation And Decision

[20] The principal question before us for determination was whether there had been a serious error as to the right principles that had been considered and applied in this case when the damages were assessed and ordered by SAR-2.

The Federal Court per Suffian LP in *Mahmod bin Kailan v. Goh Seng Choon & Anor* [1976] 1 LNS 68; [1976] 2 MLJ 239 (quoting Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ltd* [1942] AC 601) stated that an appellate court was not precluded from interfering with an award of damages, where it was demonstrated that the assessing judge had acted on a wrong principle of law, or had misapprehended the facts or has for those reasons made a wholly erroneous estimate of damage suffered.

[21] Even in *Topaiwah* (*supra*) too it was similarly noted that although an appellate court would normally decline to reverse or interfere with the quantum of damages awarded by a lower court, such intervention may be justified where the assessing judge "... had acted on some wrong principle of law or that the amount awarded was so extremely high or very small as to make it an erroneous estimate of the damages".

[22] It was not in dispute that the plaintiff had purchased the land in 1996 at a consideration of RM32,577,452.31 (sale and purchase agreement dated 15 March 1996). In a valuation report made for the plaintiff by Messrs Jones Lang Wooton dated 19 April 1996 the then open market capital value of the land was opined by the said valuer to be RM56,000,000 even "... subject to existing squatters or occupiers on site".

[23] Messrs Henry Butcher, another valuation firm had pursuant to a further valuation exercise, in their report dated 15 December 1997 assessed the then current market value free from encumbrances and with vacant possession to be RM225,000.000.

[24] It was not in dispute that the market value of the subdivided lots in the land (with vacant possession) had varied over the years with a opined value of RM35 psf in July 1996, of RM40 psf in January 1997, with some dips to RM30 psf during the period 1999 to 2002 and a recovery thereafter to RM40 psf in 2004, RM45 psf in 2005, RM50 psf in 2006 and RM55 psf in 2007. This was evident from the valuation report dated 10 October 2008 made by Messrs Rahim & Co for the plaintiff.

[25] Finally there was also available on the records a valuation report dated 25 June 2012 made by Messrs Bahari & Co wherein the total market value of the land (as at 28 April 2012) with vacant possession was estimated to be RM267,197,900.

[26] Before the SAR-2, the claim for 'loss of use' of land occasioned to the plaintiff calculated on the basis of the notional 5% pa return was tabulated and presented as follows:

Date of Valuation	Market Value	Loss of use of land: 5% of the Market Value of the Land
As at 01.07.1996	RM98,270,000.00 [@ RM35 psf]	RM4,913,500.00
As at 01.01.1997	RM112,300,000.00 [@ RM40 psf]	RM5,615,000.00
As at 01.01.1998	RM98,270,000.00 [@ RM35 psf]	RM4,913,500.00
As at 01.01.1999	RM84,230,000.00 [@ RM30 psf]	RM4,211,500.00
As at 01.01.2000	RM84,230,000.00 [@ RM30 psf]	RM4,211,500.00
As at 01.01.2001	RM84,230,000.00 [@ RM30 psf]	RM4,211,500.00
As at 01.01.2002	RM84,230,000.00 [@ RM30 psf]	RM4,211,500.00

As at 01.01.2003	RM98,270,000.00 [@ RM35 psf]	RM4,913,500.00
As at 01.01.2004	RM112,300,000.00 [@ RM40 psf]	RM5,615,000.00
As at 01.01.2005	RM126,340,000.00 [@ RM45 psf]	RM6,317,000.00
As at 01.01.2006	RM140,380,000.00 [@ RM50 psf]	RM7,019,000.00
As at 13.04.2007	RM154,410,000.00 [@ RM55 psf]	RM7,720,500.00
Total Loss (RM)		RM63,873,000.00

[27] It was plain therefore that, notwithstanding that the plaintiff might have been *de facto* deprived of the physical use of the land by reason of the presence of the defendants and other unlawful occupiers thereon, the market value of the land had not been adversely diminished but to the contrary the plaintiff stood to benefit from a marked appreciation in so far as its market value was concerned during that interim period.

[28] Counsel for the defendant referred to us the case of *Mawar Biru Sdn Bhd v. Lim Kai Chew* [1992] 1 LNS 22; [1992] 1 MLJ 336 where no damages were awarded where no property-value loss was established on the evidence. That was a case where the entry of a caveat on a piece of land by a plaintiff had prevented the defendant from completing a sale of that piece of land to a third party. After trial the impugned caveat was ordered to be removed and the defendant awarded damages. The plaintiff's appeal against that decision was dismissed by the then Supreme Court. Also the defendant there had not put up the land for sale, after the sale to the third party was aborted.

[29] At the subsequent assessment of damages proceedings there, the defendant presented a claim premised upon calculations of the 'loss of interest on balance of purchase price' that would have been received from the third party, if that sale had gone through.

James Foong JC (as he then was) in refusing to award any damages, firstly noted that, in an assessment of damages it was for the party asserting the claim for damages (in that case the defendant) to prove real and actual loss sustained. More significantly, the learned judge explained why no damages was allowed in that case in the following manner:

> The usual approach to damages in these type of cases is by determining, in the first instance, whether there is a property value loss. By this, I mean whether there is a decrease in the price of the said property after the same is offered for sale subsequent to the caveat being lifted. However, from the facts adduced before this court, I find no evidence of any property value loss.

and further;

> Under such circumstances, the defendant cannot establish as a matter of fact, that he has obtained (though it may be late in receiving), or will be under a contractual obligation to obtain, a definite sum of $3.005m since the said property has not been sold. As he has not obtained or will not be obtaining under any firm contractual obligation the sum of $3.005m, the defendant cannot be said to have suffered as at the date of this hearing for assessment of damages, actual loss on the use of $3.005m. Unless the money is already in hand (again, though it may be late in receiving), or will be received under a firm contractual obligation, the defendant suffers no real loss in terms of interest since there is no money or money due in the first place.

[30] In the instant case on appeal before us, it was not in dispute either that the plaintiff was a developer and had purchased the land for purposes of commercial/building development. The decision in *Cottrill v. Steyning Littlehampton Building Society* [1962] QBD 196, was cited to us as supporting the proposition that where a purchaser had purchased the land for development purposes, the measure for any 'loss' suffered if the purpose had been subsequently impeded, had to be established by reference to the profits contemplated or expected to be made by the purchaser, if the proposed development had gone through in time. The instructive observation of the court there in this regard was as follows:

> ... breach of contract for the sale of land knowing that the purchaser intended to develop the land for profit, special circumstances were established which entitled the purchaser to damages assessed by reference to the profits which both parties contemplated that the purchaser would make.

[31] It was undeniable that in a normal case where once a trespass to land or a deprivation of use of land had been established, the normal measure of damages to be applied would be the actual proof of 'loss of rental' or a reasonable estimation of such a 'rental return' that was directly attributable and flowing from a lawful use of the land but denied by that wrongful action. This was consistent with the two underlying basic principles in law which required that any damages awarded would, so far as money can, put the affected or deprived party in the same position as he would have been if the tort had not occurred subject to the further overriding consideration that such damages to be awarded was in any event not too remote or speculative in nature.

[32] In *Inverugie Investments v. Hackett* [1995] 3 All ER 841, the Privy Council opined (in an appeal from the Bahamas Court of Appeal) that although the plaintiff might not have suffered any actual loss by being deprived of the use of property, he was still entitled to recover a reasonable rent for the wrongful use of his property by the trespasser, and similarly, even if the trespasser might not have derived any actual benefit from the use of the property, he was still obliged to pay a reasonable 'rent' for the benefit or use he enjoyed based on what has been termed as the 'user principle'.

Lord Lloyd of Berwick delivering the advice said as follows:

> ... of the landlord of residential property, can recover damages from a trespasser who has wrongfully used his property whether or not he can show that he would have let the property to anybody else, and whether or not he would have used the property himself. The point is well expressed by Megaw LJ in *Swordheath Properties Ltd v. Tabet* [1979] 1 All ER 240 at 242, [1979] 1 WLR 285 at 288 as follows:
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> > It appears to me to be clear, both as a matter of principle and of authority, that in a case of this sort of the plaintiff, when he has established that the defendant has remained on as a trespasser on residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of damages.
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> It is sometimes said that these cases are an exception to the rule that damages in tort are compensatory. But this is not necessarily so. It depends how widely one defines the 'loss' which the plaintiff has suffered. As the Earl of Halsbury LC pointed out in *Mediana (owner) v. Comet (owners), The Mediana* [1900] AC 113 at 117, [1900-3] All ER Rep 126 at 129, it is no answer for a wrongdoer who has deprived the plaintiff of his chair to point out that he does not usually sit in it or that he has plenty of other chairs in the room.
>
> In *Stoke-on-Trent City Council v. W & J Wass Ltd* [1988] 3 All ER 394 at 402, [1988] 1 WLR 1406 at 1416 Nicholls LJ called the underlying principle in these cases the 'user principle'. The plaintiff may not have suffered any actual loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both.

[33] The question then was how, these established principles governing the issue of 'damages' recoverable where one has been wrongfully deprived of the use of land, was to be applied to the facts of this case. It was our considered view that on the peculiar facts of this case (as outlined above), what was incumbent upon the plaintiff was to adduce:

(a) Credible evidence indicative of the projected 'profits' the plaintiff had been denied by the fact that the land could not be developed as was intended (ie, when it was purchased);

(b) Alternatively, reliable evidence of either what would represent a fair rental at market rates that the plaintiff would have in all probability earned from the particular area of the land that was occupied

respectively by each of the defendants, or what would be a fair rental-benefit that would have likely accrued to each of defendants from the respective areas within the land that each of them had wrongfully occupied.

[34] The plaintiff had failed to put forward before the court any such evidence, which was alternatively open to the plaintiff (as identified above), for a proper assessment of 'damages' to be undertaken. Further and more glaringly the plaintiff also failed to demarcate and identify the size of the actual area within the land that had been separately and individually occupied by each of the defendants respectively. In the absence of such relevant material being placed before the court, SAR-2 ought not to have ordered the sweeping damages, as the court did here, implicating all the defendants without further taking into consideration the fact that the plaintiff had only been deprived of the use of such actual area in the land occupied by each of the defendants.

[35] Ideally, as a basic premise to sustain their claim for damages, the plaintiff should at least have called some evidence to show how the acts of the defendants in wrongfully occupying the land (or parts of it) had frustrated the commercial or business interest of the plaintiff in the envisaged planned development of the whole area comprised in the land. Such evidence, it must be noted, was also lacking in this case.

[36] What was before the assessing SAR-2 was the bare reliance by the plaintiff on the decision in *Toyo Textiles* (*supra)* to underpin the assertion that a sum calculated at 5% per annum of the market value of any land represented the annual 'loss' or 'yield' in respect of land affected by the trespass. In our view this assertion by the plaintiff was wholly misconceived. In our further view, SAR-2 and the learned judge, with respect, had failed to appreciate the full purport of that decision and appear to have been persuaded by a misreading of that case.

[37] *Toyo Textiles* was firstly wholly distinguishable on the facts to the situation at hand in this appeal. The claim in that case was founded in an action for nuisance against a neighbour for damages caused to the plaintiff's contiguously adjoining land. The damage in question was the flooding and water logging occasioned to the plaintiff's land as a result of the defendant's interference with a water course or natural stream caused by the raising by the defendant of the level of the defendant's land. The defendant had been ordered to by the court and had agreed to take remedial measures to restore the plaintiff's land to its original state. The defendant had failed to do so. This had in turn delayed the plaintiff's plans to obtain approval from the authorities to develop the plaintiff's own land.

[38] It was in this rather compounded default scenario and particular turn of events that there Shankar J (as he then was) held that "for lack of a better yardstick" that damages on a notional basis for a reasonable return for a

landowner so affected land would be 5% of the capital value of the plaintiff's land calculated on a yearly basis. It must be noted that, firstly, the damages awarded there was not for trespass to land *per se*. Secondly, a closer reading of that judgment would show that the court did not anywhere lay out as an acceptable principle that in all cases involving land, 5% of the capital or market value of land should form a reasonable or indicative 'loss of return' or 'loss of yield' annually for the wrongful deprivation of use of the land; to the contrary the learned judge there was careful to state that the order made there was in the circumstances of the peculiar developments and facts there.

[39] The SAR-2 and the learned judge in this case before us had clearly misdirected themselves when they accepted that '5%' of market or capital value of the land (varying from year to year over the interim years) represented a fair return or rental expected from the land for all intents and purposes. They ought to have rightfully asked – why 5%? Why not 3% or 7% or even 10%?

[40] Rental return on bare land or built-up property, as we all know, would principally depend on the location (site) of the subject property and supply and demand factors of market forces there. It would therefore be variable from place to place and over any given period of time. To accept a flat rate would be obviously antithetical to fairness and common sense in the natural course or order of things. In any event, there was no evidence led by the plaintiff why '5%' per annum was a justifiable return in the circumstances of the land in this case; this ought to have been adduced through a professional valuer with proof derived from comparable rental data available from similarly placed property in that locality.

[41] In our view, the whole-sale adoption of the '5%' formula by the courts below without further critical analysis of its very basis and crucial evidential support, was totally unjustified both on the facts and in law, in this case.

[42] It was noteworthy that in *Beatrice Ramanathan (f) & Anor v. Shah Alam Properties Sdn Bhd & Another Case* [1994] 4 CLJ 646, (where the surrounding facts were almost similar to that obtaining in the *Toyo Textiles,* case) in an action for nuisance and/or negligence affecting one's right related to land, the court there had taken a different approach. Lim Beng Choon J had this to say:

> From the cases cited above, it is clear to me that in order to achieve the general object underlying the rules for the assessment of damages in the case of a tort causing damage to real property, the Court is required to apply one or the other of two quite different measures of damage. The first is to adopt the diminution in value to the plaintiff and the second is to adopt the actual cost of repair or reinstatement. Which measure is appropriate will depend on a number of factors. Be that as it may the diminution in value is the true measure of damage if and only if the plaintiff is selling or reasonably intending to sell the property in its damaged state or where it can be established that the plaintiff is holding

> on to the property merely for investment purposes. On the other hand if the plaintiff intends to continue to occupy it and to repair the damage the proper measure is clearly the cost of all such repairs.

In the event, the proper measure of damages that was applied in that case was to compensate on the basis of the costs of all repairs and reinstatements incurred, and not the 'loss' arising from the diminution in the value of the property, although shown to have occurred there.

[43] In the instant appeal before us, the plaintiff undeniably continued to be the landlord of the land. In any case there was no diminution in value to the land directly caused by the 'trespass' of the defendants to parts of the land; to the contrary, the overall land had appreciated in value in the interim. There was also no direct evidence adduced as to any costs of 'repairs' or of damages incurred by the plaintiff with respect to the parts of the land occupied by the defendants individually. As noted above there was also no evidence of what would be a fair rental that the plaintiff could have expected from the specific land, much less any apportionment of liability for any such loss of rental as amongst the individual defendants, with reference to the respective areas separately occupied by them. On all counts therefore, the plaintiff's claim for damages was unsustainable on evidence and ought to have been rejected outright.

[44] For the reasons discussed and elaborated above we were satisfied that this was a case which clearly warranted appellate intervention to set aside the award of damages made by SAR-2 and rather mechanically affirmed by the learned judge.